STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION DTA NO. 820032
S. J. & Y ENTERPRISE, INC.	:	
for Revision of a Determination or for Refund of Alcoholic Beverage Tax under Article 18 of the Tax Law for the Period Ended December 31, 2001.	:	

Petitioner, S. J. & Y Enterprise, Inc., 2123 Nostrand Avenue, Brooklyn, New York 11210, filed a petition for revision of a determination or for refund of Alcoholic Beverage Tax under Article 18 of the Tax Law for the period ended December 31, 2001.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed December 10, 2004, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). On December 22, 2004, petitioner appeared by its representative, Leonard Fein, CPA., and submitted an answer and affidavit in opposition to the Division's motion, beginning the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioner, S. J. & Y Enterprise, Inc., a Notice of Determination, dated May 12, 2003, addressed to petitioner at 2123 Nostrand Avenue, Brooklyn, New York 11210-3001. The notice bore assessment identification number L-021995572-9 and asserted tax due of $926.52 plus interest of $76.72.

2. On March 1, 2004, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"), protesting the Notice of Determination, dated May 12, 2003, stating that all its taxes were timely paid and declaring that it had protested the "notice of 2/3/03," a reference to a Statement of Proposed Audit Changes issued to petitioner on February 3, 2003 and indicating additional Alcoholic Beverage Tax due for the period ended December 31, 2001.

3. On March 19, 2004, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

> The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on May 12, 2003, but the request was not mailed until March 1, 2004, or in excess of 90 days, the request is late filed.

4. Notices of determination, such as the one at issue herein, were computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also included the preparation of a certified mail record ("CMR"). The CMR listed those taxpayers to whom notices of determination were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service ("USPS") through return of the CMR to the CARTS Control Unit.

5. Each computer-generated notice of determination was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "Certified No." The CMR listed an initial date (the date of its printing) in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR stated an initial date of April 30, 2003 which was manually changed to May 12, 2003.

6. After a notice of determination was placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighed and sealed each envelope and affixed postage and fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the USPS and affixed a dated postmark or his signature or initials, or both, to the CMR.

7. In the ordinary course of business, a Mail Processing Center employee picked up the CMR from the USPS on the following day and returned it to the CARTS Control Unit.

8. In the instant case, the CMR was an 18-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." All pages were connected when the document was delivered into the possession of the USPS and

remained connected when the postmarked document was returned after mailing. This CMR listed 196 control numbers. Each such certified control number was assigned to an item of mail listed on the 18 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

9. Information regarding the Notice of Determination issued to petitioner was contained on page 3 of the CMR. Corresponding to certified control number 7104 1002 9739 0174 2388 was notice number L-021995572, along with petitioner's name and address, which was identical to that listed on the subject Notice of Determination.

10. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated May 12, 2003, and the initials of the postal employee, verifying receipt of the items.

11. The last page of the CMR, page 18, contained a preprinted entry of "196" corresponding to the heading "Total Pieces and Amounts Listed." Below this preprinted entry was a handwritten "196," manually circled, and beneath it were the aforementioned initials of a Postal Service employee and to the right, a postmark of the Colonie Center Branch of the USPS bearing the date "May 12, 2003." These same initials appeared on each page of the CMR.

12. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the "196" indicated that all 196 pieces listed on the CMR were received at the post office.

13. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

14. The facts set forth above in Findings of Fact "4" through "13" were established through the affidavits of Geraldine Mahon, sworn on December 8, 2004, and Bruce Peltier, sworn on December 9, 2004. Ms. Mahon was employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties included supervising the processing of notices of determination. Mr. Peltier was employed as a Mail and Supply Supervisor in the Division's Registry Unit. Mr. Peltier's duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

15. The address on the subject Notice of Determination, 2123 Nostrand Avenue, Brooklyn, NY 11210-3001, was the same as the address provided on petitioner's New York State S Corporation Franchise Tax Return for the year 2002, filed on March 15, 2003, the last return filed before the notices herein were issued. In addition, the same address was used by the Division on the Statement of Proposed Audit Changes, dated February 3, 2003, which petitioner acknowledged receiving.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

> if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner's response to the Division's motion was an affidavit of his accountant, Leonard Fein, CPA, in which he denied that petitioner ever received the notice in issue, but presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits; consequently, those facts are deemed admitted (***see***, ***Kuehne & Nagel, Inc. v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671; ***Whelan By Whelan v. GTE Sylvania, Inc.***, 182 AD2d 446, 582

NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 430 authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer subject to Article 18 of the Tax Law if a return required under Article 18 is incorrect or insufficient. Pursuant to such section, the determination "shall finally and irrevocably fix the tax" assessed by such notice, unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS, with the time period for filing such a request also being 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conciliation conference within the 90-day period is a jurisdictional prerequisite which, if not met, precludes the Division of Tax Appeals from hearing the merits of a case (***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

D. Tax Law § 434-a(2) provides as follows:

> [a]ny notice authorized or required under this article may be given by mailing it to the person for whom it is intended, in a postpaid envelope addressed to such person at the address given by him in his application for registration as a distributor or in the last return filed by him under this article or, if no application or return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of its receipt by the person to whom addressed. Any period of time, which is determined according to the provisions of this article, for the giving of notice shall commence to run from the date of mailing of such notice.

E. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice,

and the Division bears the burden of proving both the fact and date of mailing (***Matter of Novar TV & Air Conditioning Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991; ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the USPS (***Matter of Air Flex Custom Furniture,*** Tax Appeals Tribunal, November 25, 1992). When a notice is found to have been properly mailed by the Division, a presumption arises that the notice was received by the person to whom it was addressed (Tax Law § 434-a[2].) However, the "presumption of receipt" does not arise unless or until sufficient evidence of mailing has been produced and, as noted, the burden of demonstrating proper mailing rests with the Division (***see, e.g., Matter of Ruggerite, Inc. v. State Tax Commission***, 97 AD2d 634, 468 NYS2d 945, ***affd*** 64 NY2d 688, 485 NYS2d 517). In turn, the mailing evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (***see***, ***Matter of Novar TV & Air Conditioner Sales & Serv., supra***).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination, and that said procedures were followed in this case. Further, the record is clear that the address listed on the subject Notice of Determination was petitioners's last known address as indicated by the address provided on his New York State S Corporation Franchise Tax Return for the year 2002, filed on March 15, 2003,

less than two months before the Notice of Determination was issued. Further proof that the address was correct was petitioner's acknowledgment that it received the Statement of Proposed Audit Changes, sent by the Division to the same address, in February 2003.

Although petitioner's representative argued that neither he nor petitioner knew anything about the proposed assessment, the Statement of Proposed Audit Changes, which petitioner acknowledged receiving, clearly identified the tax period, type of tax and amount in issue and requested a response.

G. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination in issue was mailed to petitioner on May 12, 2003. Specifically, this 18-page document listed certified control numbers with corresponding names and addresses, including petitioner's control number, notice of determination number, name and address. All 18 pages of the CMR bore a U.S. Postal Service postmark dated May 12, 2003. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee initialed each page of the CMR and circled "196" on the last page to indicate receipt by the USPS of all 196 pieces of mail listed thereon (***cf.***, ***Matter of Roland***, ***supra***). This evidence is sufficient to establish that the Division mailed the subject Notice of Determination on May 12, 2003.

H. Petitioner's request for conciliation conference was filed on March 1, 2004, almost ten months after the date of mailing of the Notice of Determination. The request was therefore untimely filed (***see***, Tax Law § 430).

I. Petitioner's reliance on ***Matter of Ruggerite, Inc. v. State Tax Commission*** (***supra***) is misplaced. The ***Ruggerite*** decision, in discussing the presumption of receipt of a notice mailed by the Division pursuant to Tax Law § 1147(a)(1), emphasized the

petitioner's right to rebut the presumption of receipt. But in ***Ruggerite***, the notice had been returned "unclaimed" to the Division and the Court found this evidence sufficient to prove that the notice had not been received. In this matter, petitioner has not offered any proof to rebut the presumption of receipt, except to state that it never received the notice.

First, unsubstantiated allegations or assertions are insufficient to raise an issue of fact. (***Alvord & Swift v. Muller Constr. Co.,*** 46 NY2d 276, 413 NYS2d 309.) Second, the statement of petitioner's representative does not rebut the presumption of delivery established through proof of a standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing. (***See, Matter of Accardo,*** Tax Appeals Tribunal, August 12, 1993.)

J. The Division of Taxation's Motion for Summary Determination is granted, and the petition of S. J. & Y Enterprise, Inc. is dismissed.

DATED: Troy, New York
January 27, 2005

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE